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VIRGINIA LAW REGISTER

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The New Federal Equity Rules.

We publish in this number the new Rules of Practice for the Courts of Equity of the United States, with an article on the same by a learned Virginia lawyer. A careful perusal of these rules makes it evident that the influence of the English Rules in Equity has had decided weight in some respects. The Equity Courts in England nearly all meet in the city of London and England is a country with a network of railroads, so that approach to the capital city is quite easy. In addition to this the Chancery Court is practically in session all the year, with the exception of well-known and fixed vacations. Access to the Judge and Courts is therefore very easy. But in most of the states of this Union our Federal Courts are migratory and the judges sit in places far removed from the judge's place of residence, and the length of terms is exceedingly uncertain. The result of this must be that some of the rules will cause great inconvenience. Amongst these we might mention Rule No. 6 requiring the District Court "to establish regular times and places not less than one each month, when motions requiring notice and hearing may be made and disposed of." Now is a large city or a district in which access is easy to the judge and office this rule can work no hardship. But take the Western District of Virginia, for instance, where the judge holds terms in Lynchburg—his residence—Danville, Harrisonburg, Abingdon, Charlottesville and Big Stone Gap. Some of these places are hard of access and a long way from each other. Length of terms varies. At one place the judge may have to sit for several weeks; at another only a few days. It will be almost impossible for him to fix a regular time and place each month to hear motions, etc. He may fix, say the first Monday in each month in Lynchburg; as likely as not his court in Big Stone Gap, several hundred miles away, may have a

rush of business and run over beyond the day fixed. And this is likely to occur at any place. Then this obliges the judge practically to be in place at a fixed place once a month, cutting his vacation time in summer down to a month at the most.

Then the requirement that testimony of witnesses shall be taken orally in open court in all trials in equity, as provided in Rule 46, will lengthen terms and cause much inconvenience to counsel and witnesses. The latter will be compelled to dance attendance on the court for many days, for no one can tell with any certainty what day the case in which they are called will be reached and they can take no risks. Rule 47 will doubtless mitigate the hardship of Rule 46, as it allows depositions to be taken, "upon the application of either party, when allowed by statute or for good and exceptional cause for departing from the general rule." We have no doubt that the argument *ab inconvenienti* will often be used as "good and exceptional cause," the "exception be the rule." Of course as these new rules are used amendments will suggest themselves and rough edges be smoothed.

Interstate Commerce— What Law Governs.

The case of Elliott *v.* The Atlantic Coast Line, decided by the Supreme Court of South Carolina, October 2, 1912, 75 Southeastern Reporter, page 886, is of decided interest in more respects than one. The main question in the case was as to the rule governing a shipment of property from one state to another where a contract had been entered into limiting the liability of the carrier. In this case a cargo of horses and mules was shipped from Norfolk, Virginia, to Dillon, South Carolina. In consideration of a reduced freight rate granted by the railroad the shipper in the bill of lading agreed and contracted with the defendant that in case of loss or damage to any of the horses or mules, seventy-five dollars was the maximum amount to be allowed for any such horse or mule This contract contained in the bill of lading was signed in Norfolk, Virginia. En route one of the horses died and three were injured, so that the plaintiff sustained damages amounting to five hundred and seventy-seven dollars and thirty-three cents, for

which he sued. Upon the first trial of the case he recovered a verdict for the full amount claimed, which was set aside. On the second trial he recovered damages representing the value of the horses as limited in the bill of lading and damages to other horses, and the freight expenses. From this decision he appealed and the judgment and verdict were set aside by the Supreme Court. The main defence in the case was that the contract being for an interstate shipment was regulated by the interstate commerce law and not by the laws of Virginia; therefore the laws of Virginia did not apply to this interstate shipment. The Supreme Court of South Carolina held that the Acts of Assembly of Virginia, Extra Session 24, page 980, Code 1904, § 1294L, governed the case, this section providing that no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid, and the court quoted with approval C. & O. *v.* Beasley, 104 Va. 788, which construed this section as follows: "The conclusion of the whole matter may in our view be summed up as follows: At common law the carrier could not by contract limit or restrict his liability for injury or loss caused by negligence of himself or servants. The object of the Legislature was to give to this recognized common-law principle the force of a statute; and it would indeed be a singular outcome of an effort on the part of the Legislature to give an added sanction to the common law if by the ingenious construction the power to limit should be deduced from the prohibition to exempt." So the court decided that unless the Congress of the United States had sought to prohibit a carrier engaged in interstate transportation from limiting or has permitted a carrier to limit its liability to a stipulated valuation, or has legislated on the precise question at issue, the State of Virginia could require common carriers, although engaged in interstate commerce, to answer for the whole loss resulting from their negligence, whether there is a contract or not; and thereupon the court proceeded to decide that Congress had not legislated or attempted to legislate upon the subject dealt with by the Virginia statute, and that the purpose of the Interstate Commerce Act is stated in the Armour Packing Company *v.* United States, 209 U. S. 56, and various other cases,

and that as stated, its great purpose was to prevent unjust and unreasonable rates, prevent favoritism, secure equality, require publication of rates and tariffs, and to give all the same opportunity to know what the rates were and to have the equal benefit of them. The Interstate Commerce Act was intended to deal primarily with rates and discriminations, and the right of a common carrier to limit this liability by special contract is not included therein either expressly or by implication.

But the court held further that even if the act of Congress was intended to supersede all legislation on the question under consideration it could have no application, the defendant having failed to allege or prove that it had complied with the requirements of the act of Congress. The court therefore held that the Virginia statute having been construed by the Virginia court should govern in the case. The case, therefore is of double interest to the profession, not only in this State, but in others, not only upon the question of the *lex loci contractus,* but also as passing upon a somewhat novel question as to the effect of the Interstate Commerce Law upon State laws limiting liability.

Probate of Wills.

The REGISTER for the last few days has been calling the attention of our law makers and the profession generally to the inconsistencies and unfairness of §§ 2544 and 2639a of the Virginia Code. These sections have at last come under the consideration of our Supreme Court of Appeals in the cases of Saunders *v.* Link, decided Nov. 11th, 1912, and Ramsey *v.* Dodd, Nov. 21st, 1912. The latter case very briefly decides that a bill will not lie to an order of probate by the clerk of a court, the remedy being by appeal to the court whose clerk made the order admitting the will to probate. The former enters very fully into a discussion of the two sections of the Code and calls attention to the remarkable, and we may add outrageous, condition in which the law now stands. It will be recalled that when a will is probated in the clerk's office before the clerk, without notice to any one, the limitation for an appeal is *one year.* There is *no saving* as to infants or non-residents or other persons in interest not parties

to the proceedings who, without fault on their part, may be deprived of their rights after a lapse of one year by orders in a proceeding of which they have no knowledge. Yet when a will is probated *in court* under § 2544 any party interested who was not a party to the proceedings has *two years* within which to file a bill in equity to impeach or establish the will, with right to trial by jury. There is also a saving as to infants and non-residents.

The court says that this matter might with propriety be called to the attention of the Legislature, for the purpose of having a revision of the enactment, but very properly adds that where the language of a statute is plain and within the competency of the Legislature it is the province of the courts not to rewrite it, but to give it effect as they find it.

That these two sections of a law as to the probate of wills should be amended there can be no question. The Editor-in-Chief was rash enough some four years ago to draw a bill which brought these two sections in accord—making the limitation in both cases *one year*—allowing a bill to be filed or an appeal taken from the probate of the will in the clerk's office, at the option of the party contesting the will, and with a saving clause for infants, parties under disability and non-residents, in both cases. The bill was introduced in the House of Delegates, went to the committee and has remained there ever since, as far as this deponent knoweth.

It is to be sincerely hoped that in light of the court's decision in these two cases and its clear indication of the need of amendment the next Legislature will cure the glaring defects in this law.

Police Power—Authorizing the Establishing of Building Liens.

A perusal of the opinion of Mr. Justice McKenna delivered December 2nd, 1912, in the Supreme Court of the United States in the case of Eubank *v.* City of Richmond, by which the opinion of the Supreme Court of Appeals of Virginia is reversed in the case of Eubank *v.* City of Richmond, 110 Va. 735, does not convince the careful reader that our Supreme Court of Appeals was wrong. In our humble judgment the opinion of Judge

Whittle is far more convincing to the average mind and is better law than the law as now laid down, of the Supreme Court of the United States. Of course we thoroughly understand that the law now stands as the Supreme Court of the United States has delivered it, but we can only say, as a distinguished Circuit Judge once said when reversed by the Supreme Court of Appeals, "If I had been in their place and they in mine, the result would have been different." The city of Richmond in pursuance of an Act of Assembly authorizing the councils of cities and towns to establish building lines on streets to which all property owners must conform, passed an ordinance that "Whenever the owner of two-thirds of the property abutting on any street shall in writing request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five nor more than thirty feet from the street line." In pursuance of this ordinance a building line was established by the committee on streets, and the plaintiff in error, Eubank, was fined by the Hustings Court of the city of Richmond for violating this ordinance. He took an appeal to the Supreme Court of Appeals of Virginia, which confirmed the judgment of the Hustings Court of the city of Richmond, which held that the ordinance and the Act of Assembly were clearly within the "police power," and constitutional. The main argument used before the Supreme Court of Virginia was that the statute was unconstitutional and that the City Council had no power to delegate functions arising out of its police power to the Committee on Streets. Our Supreme Court held that the statute was neither unreasonable nor unusual, but passed in good faith and in the interests of the health, safety, comfort or convenience of the public, and for the benefit of the property owners generally, where affected by its provisions; and it quoted amongst other cases Barbier *v.* Connelly, 113 U. S. 27; C. B. & Q. Railway Company *v.* Drainage Commissioners, 200 U. S. 561; and Bacon *v.* Walker, 204 U. S. 311. It disposed of the second defence by saying that the committee was clothed with no discretion as to whether a street line shall or shall not be established in a given case, but the only discretion left to the committee in the discharge of an ad-

ministrative function was to determine within prescribed limits how far the building line shall be from the line of the street.

The Supreme Court of the United States, however, reversed the Supreme Court of Appeals of Virginia upon this very ground, holding that the ordinance leaves no discretion in the Committee on Streets as to whether the street line shall or shall not be established in a given case; the action of the committee being determined by two-thirds of the property owners. This the Supreme Court of the United States says is the vice in the ordinance and makes it an unreasonable exercise of the Police Power, and they argue that if one person had two-thirds ownership of a block he would therefore have power against a number having a less quantitative ownership. The United States Supreme Court seems to leave out of the question that two-thirds ownership of a block in one person would certainly entitle that person to have a definite building line established as against the wishes of one-third of the block. It is not a question here of the majority of votes, but a question of the majority of ownership, and for the benefit of the whole block, in order that the streets of a city should present a uniform appearance, and that the health, safety, comfort and convenience and the benefit of the property owners generally might be subserved.

We are constrained to the opinion, therefore, that the argument used by Mr. Justice McKenna, as controlling the Supreme Court of the United States, is not a sound one, but that the opinion of our own Supreme Court presents the right reason for its decision.

The Police Power Some More.

Count Smorltork in Pickwick Papers spoke of "Ze word Poltic" as "surprising in himself," etc. We are tempted to use the exclamation every time we read a decision of the Supreme Court of the United States on the "police power" substituting these two words for "Poltic." We have just alluded to the decision reversing our own Supreme Court in Eubank *v.* City of Richmond, where in our judgment the police power was amply sufficient to justify the city ordinance.

In the case of Purity Extract, etc. *v.* Lynch, decided Dec. 2nd, 1911, Mr. Justice Hughes, delivering the opinion of the court, holds that it is within the police power of the state of Mississippi to prohibit the sale of "any malt liquor even though it was not intoxicating and did not contain alcohol." He bases the judgment of the court upon the right of a State to prohibit the trade in intoxicants, and to sustain this view the Justice states that a general prohibition of the sale of "malt liquors," whether intoxicating or not, is a necessary means to suppression of trade in intoxicants and that such a state of law "sufficiently appears from the legislation of other states and the decision of the courts in its construction." He quotes Maine, New Hampshire, Ohio, Nebraska and Wisconsin cases. And the learned Judge might have quoted Henry's Case, 110 Va. 879. All of which is delicious reading to a lover of states rights, until we turn to the decision of the Court on the same day in the case of Buck Store, etc., Co. *v.* C. C. Vickers. where following the decision in International Text-Book Co. *v.* Pigg, 217 U. S. 91, the Court holds that not even the police power of a state permits it to compel a foreign corporation attempting to do business in the borders to comply with such reasonable terms as the Legislature has provided in requiring it to make application to the Charter Board of the State, pay a registration fee. and various other qualifications looking to a proper regulation of corporations. We commented upon International Text-Book Co. *v.* Pigg, in Volume XVI, p. 143, of the REGISTER, and we adhere to our opinion then and there expressed. When the "police powers," an "insurmountable obstacle" in many cases, comes in contact with the "irresistable power" of Interstate Commerce, chaos in legal consistency is the general result.

We wonder if the "police power" would permit a State to prohibit the sale of liquid coffee on the ground that it looks like "Brown Stout," or "cold tea" on the ground that it is not unlike whiskey. We commend a careful research into this question to the general counsel of the Postum Cereal makers.

Reform in Equity Practice in Virginia.

The Bar Association of the city of Richmond at a meeting held December 4, 1912, adopted the following resolution:

Resolved, that a committee of five members of the Richmond Bar be appointed to study the new Rules of Practice in Federal Courts of Equity promulgated by the Supreme Court of the United States November 4, 1912, and report to this Association at a subsecuent meeting whether the prompt and economical administration of justice in Virginia would be promoted by the adoption of the same or similar rules of practice in our State courts.

And the said committee shall report in full such of said rules as in their opinion should be adopted for practice in our State courts, embodying in said rules such changes or amendments as may be necessary to adapt the same to Virginia procedure.

And said committee shall designate in their report which of said last mentioned rules, if any, could be put in operation by order of the trial courts; and which of said rules may be put in operation by the Supreme Court of Appeals of Virginia under § 3112 of the Code; and which of said rules would require legislative action to enforce.

And this Association hereby requests Hon. Daniel Grinnan, formerly Judge of the Chancery Court of the city of Richmond, to act as chairman of said committee, and that the remaining four members be appointed by the president of this Association.

The chairman appointed the following committee: Daniel Grinnan, chairman; Wyndham R. Meredith, J. J. Leake, Preston Cocke, Jno. Garland Pollard.

It will thus be seen that the new Equity Rules are bearing fruit; but it is to be much regretted that the Bar Association did not appoint a committee to consider the reform of our Common-Law Practice. The practice in the Courts of Equity in Virginia has been by statute and decisions reduced to a comparatively simple matter, and if Rules No. 18 and 22 were adopted Equity Pleading in Virginia would need little amendment. The first rule alluded to abolishes technical forms of pleading except as otherwise prescribed by statute, or the new rules; and the second provides that when a suit commenced in equity should have been

brought as an action on the law side of the court, it should forthwith be transferred to the law side, with only such alterations in the pleading as shall be essential. It is to be regretted that the Richmond Bar Association has not taken up the question of reform in the common-law pleading, where reform is much more needed than in equity. We believe that if the committee of the Richmond Bar Association—which consists of some of the ablest lawyers in the Commonwealth—would formulate a system of rules for the reform of our common-law pleading, and submit them to the judges of our Supreme Court of Appeals it would not be long before that body would, as it has the right to do, simplify and reform to the fullest extent our present antiquated and cumbersome system of pleading on the law side of the courts.

Is a Publication of a Man's Death Libellous, the Man Being Alive?

Mark Twain, when shown a notice of his death in a newspaper, said the report was very much exaggerated. Heine in that wonderful little book, "Reise von München nach Genua," spoke of the little Veronica as "einer wunderschönen Frau, die damals gar Keinen Fehler hatte, ausser dass sie tot war."*

It has been left for a New York lawyer to discover that Heine was right when he spoke of "being dead" as a fault. Otherwise we cannot imagine any reputable lawyer advising and bringing a suit for libel based upon an erroneous publication of a man's death.

The case—which is certainly one of first intention in this country—actually got as far as the Supreme Court of New York. One Cohen sued the *New York Times* for publishing a notice of his death when he was in reality alive and as the suit indicated "kicking." The *Times* demurred, but the lower court overruled the demurrer. The *Times* appealed and the Supreme Court overruled the lower court, saying:

"The question whether this publication could be a libel per se involves the inquiry whether it could have injured the reputation

*An exquisitely beautiful woman who had only one fault—that of being dead.

of the plaintiff. Here is a bare item of news in a newspaper. The item states that an event has come to pass which is looked for in the history of every man, is regarded as beyond his control, and therefore does not permit the inference that the man has done any act or suffered any act which he could not have done or which he need not have suffered. Prematurity is the sole peculiarity.

"How can the publication of such an event merely as a matter of news hold up the subject to scorn, to hatred, to contempt, or to ridicule so that his reputation is impaired? Such publication may be unpleasant, it may annoy or irk the subject thereof; it may subject him to joke or to jest or to banter from those who know him or know of him, even to the extent of affecting his feelings, but this in itself is not enough."

It seems to us there is no answer to this opinion of the court and we can only wonder that such a suit could ever have been brought. But then New York is a wonderful place.